Study M-200 July 25, 2002

Memorandum 2002-47

Criminal Sentencing Statutes (Discussion of Issues)

BACKGROUND

In 1999 the Commission received legislative authorization to study whether "the law governing criminal sentencing should be revised, nonsubstantively, to reorganize and clarify the sentencing procedure statutes in order to make them more logical and understandable." 1999 Cal. Stat. res. ch. 81.

Initial input from consultants suggested that a nonsubstantive reorganization would face significant opposition from persons resistant to changes in code section numbering. In light of that possibility, the Commission decided to proceed on a narrow front — it would reorganize only a small part of the sentencing laws as a test case. If the limited reorganization proved acceptable, work would proceed in other areas as well.

The Commission then circulated a tentative recommendation proposing the nonsubstantive reorganization of statutes relating to sentence enhancements for use of a weapon or infliction of an injury. See Tentative Recommendation on *Criminal Sentencing: Weapon and Injury Enhancements* (March 2001). Response to the tentative recommendation was strongly negative. See Memorandum 2001-69 (Aug. 8, 2001); First Supplement to Memorandum 2001-69 (Aug. 24, 2001). Commentators disputed the need for reorganization and asserted that the costs associated with section renumbering would far outweigh any benefit. However, some of the commentators indicated that more substantive reform of sentencing laws might be useful.

The Commission decided against proceeding further with nonsubstantive reorganization efforts. Instead, the Commission solicited suggestions from a broad range of interested persons and groups on what substantive changes should be made to the weapon enhancement provisions. Charles E. Nickel responded on behalf of the California District Attorneys Association, proposing numerous changes to the weapon and injury enhancement provisions (without

changing any section numbers). See First Supplement to Commission Staff Memorandum 2001-91 (Nov. 14, 2001).

The Commission expressed interest in following up on the CDAA proposals, after seeking an appropriate change to its authority to study sentencing laws. The following change is proposed in this year's resolution of authority (ACR 123 (Wayne)):

> Whether the law governing criminal sentencing for enhancements relating to weapons or injuries should be revised, ~~nonsubstantively, to reorganize~~ to simplify and clarify the ~~sentencing procedure statutes in order to make them more logical and understandable~~ law and eliminate unnecessary or obsolete provisions.

CHANGED CIRCUMSTANCES

Most of the CDAA proposals have now been enacted into law (see AB 2173 (Wayne), chaptered as 2002 Cal. Stat. ch. 126). This memorandum summarizes the status of the CDAA proposals and raises the question of whether it makes sense for the Commission to commit further resources to this study at this time.

Note: all statutory references in this memorandum are to the Penal Code.

CDAA PROPOSALS INCLUDED IN AB 2173

The CDAA proposals that were included in AB 2173 are described below.

Superfluous Enhancement Provisions

There is a general rule providing that where two or more enhancements may be imposed for use of a weapon, only the greatest is imposed. See § 1170.1(f). Consequently, if two enhancements for weapon use govern the same circumstances, the lesser is superfluous. A rule requiring imposition of the greatest applicable enhancement also applies to enhancements for infliction of great bodily injury. See Section 1170.1(g).

Five superfluous enhancement provisions were deleted by AB 2173:

- **Section 12022.5(a)(2),** which imposes a three-, five-, or 10-year enhancement for personal use of a firearm in commission or attempted commission of a carjacking. This is unnecessary, considering that Section 12022.53(b) imposes a flat 10-year enhancement for personal use of a firearm in a carjacking.

- **Section 12022.5(b)(1),** which imposes a five-, six-, or 10-year enhancement for firing a firearm at an occupied car during the commission or attempted commission of a felony and causing great bodily injury or death. This is unnecessary, given that Section 12022.53(d) imposes an enhancement of 25 years to life for firing a firearm in the commission or attempted commission of enumerated felonies and causing great bodily injury or death.
- **Section 12022.5(c),** which imposes a three-, four-, or 10-year enhancement for use of a firearm in commission or attempted commission of enumerated drug felonies. This is unnecessary, considering that Section 12022.5(a) imposes the same enhancement for use of a firearm in commission or attempted commission of *any* felony.
- **Section 12022.9(b)(1),** which imposes a four-year enhancement for willfully or maliciously firing a firearm at a person from a vehicle, if the victim suffers paralysis or paraparesis of a major body part as a result. This is unnecessary, given that Section 12022.53(d) imposes an enhancement of 25 years to life for firing a firearm in the commission or attempted commission of enumerated felonies and causing great bodily injury or death.
- **Section 12022.9(b)(2),** which imposes a four-year enhancement for willfully or maliciously firing a firearm at an occupied vehicle or building, if the victim suffers paralysis or paraparesis of a major body part as a result. This is unnecessary, given that Section 12022.53(d) imposes an enhancement of 25 years to life for firing a firearm in the commission or attempted commission of enumerated felonies and causing great bodily injury or death.

Specific Language Reiterating a General Provision

In a number of instances, sections imposing enhancements include language governing various aspects of how the enhancement is to be applied. If there is generally applicable language to the same effect, the enhancement-specific language is superfluous. CDAA proposed the deletion of such superfluous language. A number of those proposals were included in AB 2173.

Codification of Judicial Decisions

CDAA proposed to codify two California Supreme Court decisions :

In *People v. Thomas*, 4 Cal. 4th 206 (1992), the court held that a court does not have discretion to strike a firearm enhancement imposed under Section 12022.5. AB 2173 amends Section 12022.5(c) to codify that decision.

In *People v. Ledesma,* 16 Cal. 4th 90 (1997), the court held that imposition of a firearm enhancement under Section 12022.5, on an underlying felony of assault

with a firearm, is not discretionary. AB 2173 amends Section 12022.5(d) to codify that decision.

In addition, CDAA proposed changes to Section 12022.53(e)(1) to eliminate an ambiguity. That section provides that a firearm enhancement may be imposed on a person who did not personally use a firearm if the person is a principal in a gang-related crime and it is proven that another principal did use a firearm. Under the prior language, it wasn't clear whether the shooter had to be *convicted* in order for the enhancement to be vicariously applied to the non-shooter. The new language requires only that use of a firearm by another principal be proven. Conviction of the shooter is not required.

CDAA Proposals Omitted from AB 2173

The CDAA proposals that were omitted from AB 2173 are described below.

Superfluous Enhancement Provision

As discussed above, CDAA proposed the deletion of a number of enhancement provisions that are superfluous because another applicable provision imposes a greater term for the same offense. One such provision, Section 12022.55, was not included in AB 2173, because it is also referenced in Section 186.22(b)(4)(B). That provision was enacted by initiative and so is less amenable to revision.

Specific Language Reiterating a General Provision

As discussed, CDAA proposed a number of changes to delete enhancement-specific language that merely reiterates a general rule stated elsewhere. Some of these proposals were omitted from AB 2173 due to objections from defense organizations. Others were omitted after questions were raised within CDAA about whether the superfluous language was useful in avoiding confusion.

"Shall" and "May"

In its letter to the Commission, CDAA noted that 145 of 150 enhancements provide that a person "shall" be punished by an additional term. Five enhancements provide that a person "may" be punished by an additional term. CDAA believes that use of "may" is misleading and is inconsistent with Section 1170.1(d), which provides that "when the court imposes a prison sentence for a felony … the court shall also impose the additional term provided for any

applicable enhancements". CDAA proposed replacing the term "may" with "shall" in each of the five sections identified. However, those changes were deemed potentially too controversial for inclusion in AB 2173.

WHAT NEXT?

After canvassing the criminal law community for suggested reforms of the existing weapon enhancement provisions, the only changes the Commission decided to pursue were those proposed by CDAA. Now that most of the CDAA proposals have been implemented, the Commission should decide how it wants to proceed. The staff sees three major alternatives:

(1) Develop the remaining CDAA proposals. However, considering that the remaining proposals are those that were considered problematic for one reason or another, the potential difficulty of enacting the changes may well outweigh the modest benefit to be gained from deleting a handful of superfluous sentences.

(2) Look beyond the CDAA proposals. The Commission could put further effort into identifying problems with the weapon and injury enhancements. However, considering the responses we received to our first inquiry, the staff suspects that there may not be any other significant problems with the weapon and injury enhancement statutes. Of course, the Commission could decide to expand the scope of its study to other parts of sentencing law, but that would require further broadening of the Commission's resolution of authority.

(3) Put the study on the back burner. The Commission could decide not to study sentencing laws in the next year.

The staff favors the third approach — put the study on the back burner. Considering how full the Commission's agenda already is, a potentially thorny project that would do nothing more than clear out a small number of superfluous sentences does not seem to be a high priority at this time. Also, the staff understands that CDAA is likely to sponsor a follow-up bill in 2003. If so, then there is probably no need for the Commission to study the CDAA proposals further.

Respectfully submitted,

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